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Supreme Court of the United States

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October Term, 1971
Docket No.71-1181.

In the Matter of the Application
of
ELSIE H. FLANAGAN and NINNA MURRAY,
Petitioners,

vs.

EWALD B. NYQUIST, as Commissioner of Education of the State of New York, and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 6 OF THE TOWN OF SOUTHAMPTON, NEW YORK,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE STATE OF NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT

JOHN P. JEHU
Associate Counsel
State Education Department
State Education Building
Albany, New York 12224
Attorney for Respondent Nyquist

ROBERT D. STONE
Counsel and Deputy Commissioner
of Education for Legal Affairs
State Education Department
State Education Building
Albany, New York 12224

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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IN THE

Supreme Court of the United States

October Term, 1971

Docket No. 71-1181.

In the Matter of the Application
of
ELSIE H. FLANAGAN and NINNA MURRAY,
Petitioners,

vs.

EWALD B. NYQUIST, as Commissioner of Education of the State of New York, and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 6 OF THE TOWN OF SOUTHAMPTON, NEW YORK,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE STATE OF NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT

Respondent Ewald B. Nyquist, as Commissioner of Education of the State of New York, respectfully prays that the petition herein for writ of certiorari to the State of New York Supreme Court, Appellate Division, Third Judicial Department be denied.

Opinions and Orders Below

The orders of the State of New York Supreme Court, Albany County, are annexed hereto as appendixes A and B.

The orders of the State of New York Supreme Court, Appellate Division, Third Judicial Department, and the order of the State of New York Court of Appeals are annexed to the petition for writ of certiorari as appendixes C, E and F respectively. The opinion of the State of New York Supreme Court, Appellate Division, Third Judicial Department is annexed hereto as appendix C, and is reported at 38 AD 2d 645. The opinion of the State of New York, Supreme Court, Albany County is reported at 66 Misc. 2d 736. The opinion of the latter on the motion for reargument is dated July 9, 1971, and is not officially reported.

Jurisdiction

The asserted basis of jurisdiction is alleged denial of petitioners' right to equal protection of the law under the Fourteenth Amendment to the United States Constitution and to due process of law under the Fourteenth Amendment to the United States Constitution. Statutory provision alleged conferring on this Court to review the order in question is 28 U. S. C. sec. 1257 (3).

Questions Presented for Review

1. Was not the New York Court of Appeals correct when it held, in effect, that the United States Constitution does not require the New York Legislature to provide absentee balloting procedures for school districts simply because such procedures are provided for federal, state and certain municipal elections, particularly where the nature of the school district meeting is such that it is practically impossible to provide for absentee balloting?

2. Was not the New York Court of Appeals correct when it held, in effect, that the hearing before the Com-

missioner of Education fully satisfied the requirement of due process of law?

Constitutional Provisions and Statutes Involved

Amendment XIV, United States Constitution:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." 28 U. S. Code, Section 1257 (3):

"Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: . . . (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Statement of the Case

On October 31, 1970, the Board of Education of Union Free School District No. 6, Town of Southampton, presented to the voters for their approval a comprehensive building program. The program involved constructing an addition to the existing high school building and utilizing the resulting structure as an intermediate school, and the construction of a new high school building on land already owned by the district. The voters were asked to

approve this plan and the funding thereof through the sale of bonds at a total cost of $8,985,000. This plan was presented as a single proposition at a special district meeting held on October 31, 1970.

Notice of the meeting was published in the "Southampton Press" on October 1, 8, 15, 22, 29, 1970. In addition, the superintendent of schools and various board members spoke to local civic groups, and prepared brochures and news releases. The local radio station was also furnished material relating to the building program and the special district meeting.

The final voter registration rolls listed 2994 registered voters, of whom 2245 voted at said meeting. A total of 1238 votes were cast in favor of the proposition, 948 votes were cast against, and 59 ballots were blank.

No voter requested an absentee ballot, nor was any voter challenged.

The Commissioner of Education ruled that there was no right to an absentee ballot as alleged in the petition, and that no irregularity had been demonstrated which would constitute valid grounds for setting aside the results of the election.

ARGUMENT

I. Petitioners have not exhausted all of their remedies for review by the Courts of the State of New York.

A writ of certiorari to the Appellate Division, Third Department, of the State of New York should not be granted to petitioners, who have failed to apply to the New York Court of Appeals for leave to appeal as provided by subdivision (a) of section 5602 of the Civil Practice Law and Rules of the State of New York.

The order of the Court of Appeals granting a motion to dismiss petitioners' appeal upon the ground that no substantial constitutional question was directly involved related solely to petitioners' appeal as of right to that court as provided by subdivision (b) of section 5601 of the Civil Practice Law and Rules of New York. As the result of petitioners' failure to apply to the New York Court of Appeals for permission to appeal, the judgment appealed from is not that of the highest court of the State. If the highest court of the State has been authorized by statute to review the decision of inferior courts in its discretion, and no application has been made therefor, this Court should decline to review the action of the inferior court *Mathews* v. *Huwe*, 269 U. S. 262; *Stratton* v. *Stratton*, 239 U. S. 55; *Andrews* v. *Virginian R. Co.*, 248 U. S. 272.

II. Petitioners lack standing to raise a constitutional question.

At no time have petitioners established that they, or any qualified voter of the school district, applied for or were refused an absentee ballot. The president of the board of education stated in an affidavit that neither of the petitioners nor any other voter in the district at any time applied to the board of education, the board registration or the district clerk for an absentee ballot. Respondent noted in his decision that no valid claim of disenfranchisement had been established (66). Petitioners' argument that some persons who maintain summer homes within the school district could not vote in the special district meeting at issue was totally unsupported by any evidence that these individuals were qualified voters or that they had applied for an absentee ballot.

The Appellate Division of the Supreme Court, Third Department ruled that respondent's finding that there were

no qualified voters not present in the school district on the day of the special district meeting was supported by the record. That Court concluded that:

> "Accordingly, petitioners' attempt to raise such a constitutional issue in this Article 78 [of the Civil Practice Law and Rules] proceeding is without merit." (Appendix C hereto)

From the record, it is readily apparent that petitioners have not sought absentee ballots, and are thus not injured by the alleged failure of the State of New York to provide such ballots. In essence, petitioners seek an advisory opinion from this Court in the absence of a justiciable controversy. The judicial power does not extend to the determination of abstract questions *Muskrat* v. *United States,* 219 U. S. 346. A claim based upon an assumed potential invasion of rights is not enough to warrant judicial intervention *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288; *United States* v. *West Virginia,* 295 U. S. 463. As this Court indicated in *Local No. 8-6, Oil, Chemical and Atomic Workers International Union AFL-CIO et al.* v. *Missouri,* 361 U. S. 363, constitutional questions are not to be dealt with abstractly; they will not be anticipated but will be dealt with only as they are appropriately based upon a record before the court. Clearly, the record in this case lacks any basis for the consideration of the constitutional issue petitioners attempt to raise.

Petitioners may not assert the right of equal protection of law on behalf of other residents of the district. Parties to the litigation should rely only upon constitutional rights which are personal to themselves *Tileston* v. *Ullman,* 318 U. S. 44; *National Assoc. for Advancement of Colored People* v. *Alabama, ex rel. Patterson,* 357 U. S. 449; *Pratt* v. *LaGuardia,* 182 Misc. 462, affd. 268 App. Div. 973, appeal dismissed 294 N. Y. 842.

Therefore, petitioners lack standing to raise a constitutional question on the alleged denial of equal protection in school district elections in New York.

III. The equal protection clause does not require that absentee ballots be made available to voters in school district elections.

Article II, section 2 of the New York Constitution authorizes, but does not require, the State Legislature to provide a manner in which voters in any election who are absent from their residence or unable to appear personally at the polling place may vote. The Courts of New York have uniformly held that various provisions of Article II of the New York Constitution refer to general elections and are not applicable to school district meetings and elections *Spitzer* v. *Village of Fulton*, 172 N. Y. 285; *Berge* v. *Hollister*, 275 App. Div. 852; *Turco* v. *Union Free School District No. 4, Town of North Hempstead*, 43 Misc. 2d 367, affirmed 22 AD 2d 1018.

An examination of the various sections of Article II clearly reveals that this Article was not intended to apply to school districts. Section 1 which specifies the qualifications of voters refers to residency in a city, county or village, rather than school district. This point is significant because very few school districts are coterminous with any of these political subdivisions. Similarly, section 5, concerning registration of voters makes no reference to school districts. Section 8 provides for bipartisan registration and election boards, with representation equally divided among political parties. School district elections in New York State have traditionally been non-political in nature.

The Legislature has provided for the use of absentee ballots for general elections by section 117 of the Election

Law. This statute repeatedly refers to general elections, makes an express exception in the case of ballots for "an election of school district officers at which no other public officer is to be elected," and has been construed as not applying to school district elections *Savage* v. *Board of Education, City of Glen Cove School District,* 29 Misc. 2d 725, affd. 8 AD 2d 650, motion for permission to appeal denied, 8 AD 2d 911, motion for leave to appeal denied, 7 NY 2d 706. The Attorney General of New York has also ruled that sections 117 and 117-a of the Election Law are by their terms restricted to a general election, or a special election held pursuant to section 42 of the Public Officers Law (1966 Op. A. G. 80, 1968 *id.* 111).

The failure to provide absentee ballots in a school election does not disenfranchise a voter. In argument before the respondent Commissioner of Education, petitioners attempted to rely upon the decision of this Court in *Kramer* v. *Union Free School District No. 15,* 395 U. S. 621, in support of their contention that school district meetings since *Kramer* are elections within the meaning of the Election Law. In *Kramer,* a denial of franchise case, this Court concluded that the classification of eligible voters was not sufficiently precise to limit the vote to those primarily interested in school affairs as argued by the State of New York. In instances where the franchise is denied or impaired the Court indicated that the test to be applied is whether the exclusions are necessary to promote a compelling state interest *Carrington* v. *Rash,* 380 U. S. 89; *Pope* v. *Williams,* 193 U. S. 621; *Cipriano* v. *City of Houma,* 395 US 701; *Phoenix* v. *Kolodziejski,* 394 US 204; *Dunn* v. *Blumstein,* ____ US ____, No. 70-13, March 21, 1972, 40 LW 4269.

Contrary to petitioners' contention, *Kramer* did not make the New York Election Law applicable to New York school district meetings and elections. It merely invalidated paragraphs a, b and c of subdivision 3 of section 2012 of the New York Education Law. On remand, the three-judge court in fact specifically stated that section 2012 remained the applicable law except as indicated (a copy of the order and judgment is attached hereto and made a part hereof).

There is an important distinction between the right to vote and the right to an absentee ballot, as noted by Chief Justice WARREN in *Kramer* at 395 US 624:

> "This case presents an issue different from the one we faced in *McDonald* v. *Board of Election Comm'rs of Chicago,* 394 US 802, 98 St. Ct. 1404 (1969). The present appeal involves an absolute denial of the franchise. In *McDonald,* on the other hand, we were reviewing a statute which made casting a ballot easier for some who were unable to come to the polls. As we noted, there was no evidence that the statute absolutely prohibited anyone from exercising the franchise; at issue was not a claimed right to vote but a claimed right to an absentee ballot."

In *McDonald,* this Court indicated that the proper test of the constitutional validity of a statute according the privilege of absentee ballots to some voters and denying this privilege to others, which statute has been challenged upon the theory of a denial of equal protection of the laws, is whether the statute bears some rational relationship to a legitimate state end. There, as distinguished from absolute denial of the franchise cases, the statutory classification will be set aside only if no grounds can be conceived to justify them *McGowan* v. *Maryland,* 366 US 420; *Kotch* v. *Board of River Port Pilot Commissioners,* 330 US

552; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 US 61; *Walters* v. *City of St. Louis*, 347 US 231.

The omission of the Legislature in not providing absentee ballots for school meetings and elections is required by practical necessity and reflects the traditional concept of the town-meeting type of district election, *i.e.*, a meeting of the inhabitants of the district. Section 2011 of the Education Law provides that:

> "Whenever any district meeting shall be duly called, it shall be the duty of the inhabitants qualified to vote thereat, to assemble at the time and place fixed for the meeting."

With certain exceptions, the basic concept of this type of school district meeting provides for the making of motions from the floor, which are seconded and passed and may cover appropriations of money for stated purposes, reductions in appropriations or elimination of appropriations; such motions may cover a wide variety of matters relating to the governance of the school district. There is no requirement (except for issuance of obligations, nomination of candidates for the school board and a few other items) conditioning such motions upon inclusion in the notice for the meeting. Hence there is no way that an absentee ballot could be prepared and sent out prior to the meeting and yet contain those matters on which a vote will need to be had. To send out such necessarily incomplete absentee ballots would serve no purpose and would, in fact, partially disfranchise the persons receiving them.

With certain exceptions, the budget vote can be had by items, again based on motions made from the floor and not required to be noticed prior to the meeting.

This option of the voters who attend in person would likewise be removed if absentee ballots were permitted.

Individual voters may initiate propositions which may be filed not less than six days before a district meeting in districts where voting machines are used (Section 2035, subdivision 2 of the Education Law). Similarly, nominations of candidates for a board of education may be made at least 14 days prior to the school district elections (Section 2018 of the Education Law). Obviously, these submission deadlines would preclude timely mailing of absentee ballots and their return. It is clear, therefore, that under the entire legislative scheme of the New York State school system, absentee ballots are not practically feasible.

There is a further problem in trying to make absentee ballot procedures applicable to New York school districts. These units of government do not have permanent election boards, such as the municipalities referred to by petitioners possess. The "election inspector" provided by the Education Law, function only during the meeting or election and there is no staff available, nor any provisions of statute providing for the necessary procedures, such as exist for cities, towns, counties and villages. Where personal registration is provided by local decision, again the functions of the registration board are specifically circumscribed and do not provide for absentee ballot procedures such as exist for the municipalities under the Election Law (See Election Law, §§ 117, 117-a, 117-b, 118, 119, 121, 122, 123, 153-a, 85 (subd. 2), 330 (subd. 4 & 7), 204, 274, 221, 222, 262, 229, 314).

Petitioners' contention that because qualified voters in general elections have the benefit of absentee registration and voting, the State of New York may not fail to provide this benefit to voters in school meetings is simplistic and without merit. A similar argument was raised in *McDonald, supra*, and was rejected. See also, *Ozan Lumber Co.*

v. *Union County National Bank*, 207 US 251; *Miller* v. *Wilson*, 236 US 373; *Semler* v. *Dental Examiners*, 294 US 608; *South Carolina* v. *Katzenbach*, 383 US 301. In New York, it has also been held that legislation which does not affect all areas uniformly is not rendered unconstitutional as a denial of equal protection of the law *Packer Collegiate Institute* v. *University of New York*, 273 App. Div. 203; *Four Maple Drive Realty Corp.* v. *Adams*, 2 AD 2d 753, appeal denied 2 AD 2d 781, appeal dismissed 2 NY 2d 837, appeal dismissed 355 US 14.

It is well established that equal protection of the law has been achieved when all of the same class are treated in a like manner, even though that one class is treated differently than other classes *Yick Wo.* v. *Hopkins*, 118 US 356, 367, *Queenside Hills Realty Co.* v. *Wilson*, 294 NY 917, affirmed 328 US 80, *Engelsher* v. *Jacobs*, 5 NY 2d 370. In the instant case, all voters within the class of citizens voting in school district meetings and elections are treated similarly, even though different rules necessarily apply to those voting in a general election.

It should also be noted that there is no constitutional right to vote in a school district election *Janowsky* v. *Parsons*, 207 Misc. 107, affirmed 285 App. Div. 601; *Cohen* v. *State*, 52 Misc. 2d 324; *Three Village Taxpayers Association* v. *Board of Education of Three Village Central School District No. 1* (Supreme Court, Suffolk County, TASKER, J. n. o. r. NYLJ, Sept. 19, 1968, page 18, columns 6, 7); *Oliver* v. *Board of Education of New York City*, 306 F. Supp. 1286.

Furthermore, a majority of the citizens of New York reside in city school districts with a population in excess of 125,000. These large city school districts are fiscally

dependent upon the cities they serve, and most of them have appointed boards of education. The affairs of these school districts are governed by Article 52 of the Education Law, which makes no provisions for voting of any kind by the residents of these school districts.

Therefore, there is no right to an absentee ballot in a school district meeting or election, and the failure to provide an absentee ballot did not constitute a denial of equal protection of the laws. The courts below properly refused to invalidate the decision of Respondent Nyquist.

IV. The hearing before the Commissioner fully satisfied the requirement of due process of law.

The Commissioner's resolution of this dispute without the admission of oral evidence does not raise a constitutional question. Part 276.2 (d) of the Regulations of the Commissioner states: "All evidentiary material shall be presented by affidavit of by exhibits. No testimony is taken and no transcript of oral argument will be made." The statutory authority for this regulation is contained in section 311 of the Education Law, which gives the Commissioner the power to regulate the practice in appeals brought pursuant to section 310 of the Education Law.

On two different occasions, the New York Court of Appeals has upheld the procedure of the Commissioner in cases contesting school elections whose subjects were bond issues and increased taxation, directly affecting the property rights of the residents of the districts. See also *Matter of Savage* v. *Allen*, 13 Misc. 2d 489; *Matter of Liebman* v. *Van Denburg*, 168 Misc. 155.

In *Matter of O'Brien* v. *Commissioner of Education*, 4 NY 2d 140, cert. denied *sub nom. Murphy* v. *Commissioner*

of Education, 361 US 117, the New York Court of Appeals stated at page 145:

> "Quite obviously, and we recently so held in a case very similar to the present one, that Commissioner of Education's resolution of a dispute on conflicting affidavits without an oral hearing neither directly involves the construction of the constitution nor poses a constitutional question of any kind. (See *Matter of Kuhn* v. *Commissioner of Educ.*, 2 N. Y. 2d 749, . . .) . . ."

In *Matter of Kuhn* (*supra*), the Court of Appeals denied leave to appeal from the decision of the Appellate Division found at 1 AD 2d 533. That decision said in part, at 537:

> "Neither do we deem arbitrary his [Commissioner of Education's] election to rest his decision upon the great mass of proof adduced in affidavit form and by other documents rather than to receive oral testimony as he was authorized to do by section 311 or subdivision 12 of 2215 of the Education Law, such reception being permissive and discretionary under the rules of practice adopted pursuant to section 311."

Petitioners concede that there is no statutory or constitutional requirement that the Commissioner hold a hearing to determine whether the board of education exceeded the bounds of propriety with its informational program in support of the building program. The other issues raised before the Commissioner, *e.g.*, the use of absentee ballots, the proper form of a ballot and the requirements of due notice of the meeting are all questions of law for which an evidentiary hearing is inappropriate. Petitioners have suggested that this Court might direct a hearing to be held to determine whether there is a wide disparity between districts regarding the disbursement of funds for each student. This matter was never raised before the Commissioner, and under New York Procedure it is com-

pletely outside the scope of judicial review of his decision (Section 7803, Civil Practice Law and Rules). The Appellate Division, Third Department expressly refused to consider this question not raised before the Commissioner of Education, as follows (Appendix C hereto):

> "The petitioners further contend upon this appeal that a hearing should be directed as to the question of disparity between certain school districts as to the amount of money being spent on a per pupil basis in regard to the equality of education. This question was not properly raised in the prior proceedings and would appear to go to the issue of the constitutionality of a real property tax for the funding of school districts. The issue is not properly before us and we do not decide the same."

It should also be noted that this issue is totally irrelevant to the validity of the special district meeting which petitioners have challenged. Therefore petitioners may not rely upon this issue to question the procedure employed by the Commissioner of Education.

Conclusion

The petitioners have not exhausted all of their remedies for review by the Courts of the State of New York. The petitioners lack standing to raise a constitutional question. The Fourteenth Amendment to the United States Constitution does not prohibit the State of New York from providing the convenience of absentee balloting to voters in general elections held within the state and withholding this convenience from voters in school district elections and meetings held in the State of New York. The hearing before the Commissioner of Education fully satisfied the requirement of due process of law. In the absence of a substantial federal question, this Court should decline to re-

view the decisions of the Commissioner and the Courts of the State of New York.

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN P. JEHU
Associate Counsel
State Education Department
State Education Building
Albany, New York 12224
Attorney for Respondent Nyquist

ROBERT D. STONE
Counsel and Deputy Commissioner of Education for Legal Affairs
State Education Department
State Education Building
Albany, New York 12224

Of Counsel

APPENDIX A

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of Albany, at the County Courthouse in the City of Albany, on the 11th day of June, 1971.

Present: Hon. DeForest C. Pitt,

Justice.

(Same Title.)

Petitioners, Elise H. Flanagan and Ninna Murray, by their attorney, Bennett E. Aron, Esq., having commenced a special proceeding for judgment pursuant to section 7806, of the Civil Practice Law and Rules annulling and setting aside a judicial determination duly made pursuant to section 310 of the Education Law by Ewald B. Nyquist, as Commissioner of Education of the State of New York, which dismissed the appeal of said Elise H. Flanagan, Ninna Murray and one other from the action of the Board of Education of Union Free School District No. 6 of the Town of Southampton, New York, in relation to the conduct of a special district meeting, and said appeal having regularly come on to be heard before the Hon. DeForest C. Pitt at a Special Term, Part I of this Court, held at the County Courthouse thereof, located in the City of Albany, on the 11th day of June, 1971, and the petitioners having duly appeared by Bennett E. Aron, Esq., and the respondent Ewald B. Nyquist, having duly appeared by Robert D. Stone, Counsel to the Commissioner of Education of the State of New York (James H. Whitney, Esq., of Counsel) and the intervenor Board of Education of Union Free School District No. 6 of the Town of Southampton, New York having duly appeared by Thomas J. Bourke, Esq.,

and the issues in the above-entitled proceeding having been submitted in lieu of oral argument at the call of the calendar.

Now, upon reading and filing the notice of motion dated the 1st day of May, 1971 and the petition duly verified the 1st day of May, 1971, together with the exhibits annexed thereto, all in support of petitioners' application to review the decision of the Commissioner of Education and for judgment in accordance with petitioners' prayer for relief, and upon the notice of motion to dismiss the petition dated the 25th day of May, 1971 and the affidavit of James H. Whitney, Esq., sworn to the 25th day of May, 1971, all in support of said motion to dismiss the petition and in opposition to petitioners' motion to review, and upon the stipulation permitting joinder of the Board of Education of Union Free School District No. 6 of the Town of Southampton, New York, and upon the briefs and affidavits submitted by the attorneys for the respective parties, and upon all the proceedings heretofore had herein; due deliberation having been given; and a decision of this Court having been made thereon on June 23, 1971, by the Hon. DeForest C. Pitt in favor of the respondent Ewald B. Nyquist, as Commissioner of Education of the State of New York and respondent-intervenor the Board of Education of Union Free School District No. 6 of the Town of Southampton, New York, directing the entry of judgment as hereinafter provided, it is

ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of respondent Ewald B. Nyquist as Commissioner of Education of the State of New York and the Board of Education of Union Free School District No. 6 of the Town of Southampton, New York and against Elise H. Flanagan and Ninna Murray, dismissing on the merits the

petition to review heretofore served herein, and the same is hereby dismissed without costs.

Dated: July 2, 1971.

Enter

DEFOREST C. PITT
Justice of the Supreme Court

APPENDIX B

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of Albany on the 9th day of July, 1971 (Justice John H. Pennock, Presiding—referred to Hon. DeForest C. Pitt, for decision).

Present: Hon. DeForest C. Pitt.

(Same Title.)

Petitioners, Elise H. Flanagan and Ninna Murray, by their attorney, Bennett E. Aron, Esq., having commenced a special proceeding for judgment pursuant to section 7806 of the Civil Practice Law and Rules annulling and setting aside a judicial determination duly made pursuant to section 310 of the Education Law by Ewald B. Nyquist, as Commissioner of Education of the State of New York, said appeal having regularly come on to be heard before the Hon. DeForest C. Pitt at a Special Term, Part I of this Court, held at the County Courthouse thereof, located in the City of Albany, on the 11th day of June, 1971, and a decision of this Court having been made thereon on the 23rd day of June, 1971 by the Hon. DeForest C. Pitt in favor of the respondent Ewald B. Nyquist, as Commissioner of Edu-

cation of the State of New York and respondent-intervenor the Board of Education of Union Free School District No. 6 of the Town of Southampton, New York, directing the entry of judgment, said judgment having been signed by the Hon. DeForest C. Pitt on the 2nd day of July, and duly entered on the 7th day of July, 1971, and an application to reargue having been made by the petitioners;

Now, upon reading and filing the notice of motion dated the 28th day of June, 1971, and the affirmation dated the 28th day of June, 1971, all in support of petitioner's application to reargue petitioners' original application to review the decision of the Commissioner, and upon the affidavit of James H. Whitney, Esq., sworn to the 8th day of July, 1971, submitted by the respondent Ewald B. Nyquist, as Commissioner of Education, and upon the affidavit of Thomas J. Bourke, Esq., sworn to the 8th day of July, 1971, which was submitted by the respondent-intervenor Board of Education of Union Free School District No. 6 of the Town of Southampton, New York, all in opposition to said application to reargue, no oral argument having been requested or heard, and upon all the pleadings and proceedings heretofore had herein, due deliberation having been had thereon, it is

ORDERED, ADJUDGED AND DECREED that petitioners' application for reargument be and the same is hereby denied and the judgment heretofore rendered in this matter is affirmed, without costs.

Dated: Troy, New York, July 29, 1971.

Enter

DEFOREST C. PITT
Justice of the Supreme Court

APPENDIX C

SUPREME COURT

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT

December 20, 1971. 17738

(Same Title.)

Appeal by the petitioners from a judgment of the Supreme Court at Special Term, entered in Albany County on July 7, 1971, which dismissed the petition herein upon the merits.

The petitioners contested by way of an appeal to the respondent commissioner the validity of a school district election at which the voters of the district approved a certain building program and the issuance of bonds to fund the project. The Commissioner refused to set aside the results of the election. The Commissioner specifically found that there was no constitutional infirmity as to the election in question by virtue of the fact that absentee ballots are not provided for in school district elections. Among other things, he noted that it did not appear that there were any qualified voters not present in the district on the day of the election, and that finding is supported by the record. Accordingly, the petitioners' attempt to raise such a constitutional issue in this Article 78 proceeding is without merit.

The petitioners further contend upon this appeal that a hearing should be directed as to the question of disparity between certain school districts as to the amount of money being spent on a per pupil basis in regard to the equality of education. This question was not properly raised in the prior proceedings and would appear to go to the issue of the constitutionality of a real property tax for the funding

of school districts. The issue is not properly before us and we do not decide the same.

There is no showing that the Commissioner has erred as a matter of law or that his determination was otherwise purely arbitrary. (*Cf. Matter of Board of Educ., Cent. School Dist. No. 2, Town of Oyster Bay* v. *Nyquist*, 36 A D 2d 199, 201.)

Judgment affirmed, without costs.

HERLIHY, P. J., REYNOLDS, GREENBLOTT, SWEENEY and SIMONS, JJ., concur.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MORRIS H. KRAMER,

Plaintiff,

against

UNION FREE SCHOOL DISTRICT #15, RAYMOND S. BARON, JESSE CESTARI, BARDON DIEXEL, RALPH J. EDSEL, J. GIBSON FRUIN, ELLIOT A. NORWALK and HAROLD S. ROSENFELD,

Defendants,

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Intervenor.

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66 Civ 76
Judgment

This cause having been decided by the Supreme Court of the United States of America in favor of plaintiff, June 16, 1969, and having been, by that Court remanded for further proceedings consistent with the said opinion of the United States Supreme Court so rendered on June 16, 1969, and a further hearing having been held thereon on November 24, 1969, before this Court, it is hereby

ORDERED, ADJUDGED AND DECREED that paragraphs a, b and c of subdivision 3 of the New York State Education Law section 2012, together with the language of the opening paragraph of subdivision 3 of said section following

the semi-colon therein are in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and are hereby declared to be void and of no further force and effect; and it is, further,

ORDERED, ADJUDGED AND DECREED that the remaining voting qualifications of said section 2012 of the New York State Education Law shall be and remain in full force and effect and shall constitute the only valid voting qualifications for any and all school district meetings and elections to which said section is applicable, held or to be held on and after June 17, 1969; and it is further,

ORDERED, ADJUDGED AND DECREED, that said remaining voting qualifications of said section 2012 shall be and remain in full force and effect and shall constitute the only valid voting qualifications for any and all school district meetings and elections in Union Free School District No. 15 of the Town of Hempstead, Nassau County, New York, held or to be held on and after June 17, 1969; and it is, further,

ORDERED, ADJUDGED AND DECREED that nothing herein shall be deemed to affect the validity of elections heretofore held under said section 2012.

Dated: Brooklyn, New York, December 10th, 1969.

LEONARD P. MOORE
United States Circuit Judge

JOHN R. BARTELS
United States District Judge

JACK B. WEINSTEIN
United States District Judge